July 2014 Bar Examination Sample Answers

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QUESTION 1 - Sample Answer # 1

1. Bill cannot force the liquidation of Black Acre, Inc. because he does not own a majority of the shares entitled to vote on liquidation of the corporation. Liquidation is an extraordinary event in corporate existence and thus is not appropriate for the board of directors to act on in the absence of shareholder approval. Though Bill occupies one of four seats on Black Acre, Inc.'s board, only the board acting as a body can bind the corporation. In addition, shareholders must be consulted on whether or not to dissolve a corporation or sell substantially all of its assets. Before Mary's death, Bill owned 10% of Black Acre, Inc.'s stock, and with an equal distribution of Mary's shares he will inherit another 15% after probate, giving him 25% ownership. This is not a sufficient amount to constitute a majority of the shares entitled to vote of the matter of liquidation, and thus Bill cannot unilaterally force liquidation of Black Acre, Inc, even if he were to raise the issue at a shareholder meeting.

2. (a) Because Blackacre is substantially all of the assets of Black Acre, Inc., it cannot be sold in the normal course of business by the directors acting as a board. In most situations, the board could effect such a sale in the normal course of business. Because the sale is substantially all of the assets of the corporation, the shareholders must vote and approve the sale of the asset. If such approval was given by a majority of the shares eligible to be voted on the issue, given a quorum present at a shareholder meeting, then the board would be empowered to sell Blackacre. However, a quorum could only be convened once Mary's shares have been distributed following probate. Once the shares are in the children's hands, they will be able to vote for the sale of Blackacre. The board could then effect the sale as a body or could empower Dora, as the president, to conclude the business of selling Blackacre to the farmer.

(b) I would recommend that Dora convene her siblings in their capacity as shareholders to vote upon the sale of substantially all of Black Acre, Inc.'s assets and to distribute those assets to the siblings in liquidation. To do this, the board would need to vote to put the question to the shareholders, which it can do by a majority vote. Because Dora and two of her brothers seem inclined to the sale, they have the votes needed to put the question to the shareholders. She will need a majority of the votes of the shareholders, and Dora can count on her own and two of her brothers' shares to be voted in her favor. However, because 60% of the corporate shares are moving through probate, they are likely unable to be voted and thus a quorum cannot be convened. Dora could vote the shares as

personal representative of Mary, however such a move might risk violating the fiduciary duties owed by Dora to Mary's estate and the natural objects of Mary's bounty. It would be risky for Dora to use her powers to dispose of stock and LLC units to overcome Bill's dissent, as that might be seen as self-dealing and a violation of her fiduciary duties. To be safe, until probate is completed, Mary can only muster 40% of the shares to vote on the matter, and only 30% are inclined to support her proposed sale. Thus she is likely to be limited in the sale of Blackacre until the shares are distributed and she and her brothers possess 75% of the shares of Black Acre Inc. If she does not wish to wait for probate to conclude, Dora could seek a court order in superior court liquidating the corporation, though there would be the necessity of showing cause and it may be more efficient for Dora to expedite probate rather than seeking a court order while waiting for her mother's administration to conclude.

(c) Once the sale of Blackacre is accomplished, the proceeds of the sale will become property of the corporation. Because all of the assets of the corporation are being disposed of, the shareholders will likely want to liquidate the corporation and distribute the corporate property to the shareholders in proportion to ownership. Thus, once Mary's shares are distributed in kind to the children, Dora and her three brothers will each receive 25% of the proceeds of the sale after corporate taxes and obligations have been accounted for.

3. (a) As member manager of White Acre LLC, Dora is empowered to dispose of property in the normal course of business. However, since White Acre is substantially all of the assets of White Acre LLC, Dora cannot effect its sale without the permission of the LLC members. She will need the permission of all LLC members to effect the disposition of all the LLC assets.

(b) Dora should seek, with her brothers, to persuade Bill to agree to the sale of White Acre. If they cannot, they can expel him from the LLC under Georgia law or could seek liquidation of the LLC in Georgia court due to the inability of the LLC to continue operating due to dissension of a partner. If ordered to liquidate, White Acre could be sold and the proceeds distributed to the LLC members in proportion to their ownership interest.

4. (a) Green Acre is held by the four children as tenants in common, with a one-fifth interest in the property moving through probate. Thus Mary's estate and the four children each hold an undivided one-fifth interest in Green Acre. Tenants in common can only unilaterally sell their own interest in the property, and thus for a total sale of Green Acre, all the children would need to consent. Because Bill seems unlikely to consent, the children should seek partition of Green Acre in superior court, which could take the form of either equitable distribution if the land is readily dividable or by sale and distribution of the proceeds.

(b) Dora and her brothers should seek to persuade Bill to sell Green Acre. Given Dora's power to dispose of Mary's assets as administrator, Dora can sell the estate's share of Green Acre. Such an act by the administrator might be scrutinized by the courts for violations of fiduciary duties, especially if Dora acts to her own advantage and Bill's disadvantage. It would be preferable for Dora to distribute the interest in kind to the

siblings, giving them each an undivided one-fourth interest instead of their present one-fifth interests. At that point, the children could sell their interests to the farmer or seek partition in court if Bill refuses to convey his interest.

QUESTION 1 - Sample Answer # 2

1. The issue is whether Bill can unilaterally force liquidation of the corporation. The rule is that one member of the corporation cannot unilaterally force a liquidation of the corporation, instead, the director needs approval from a majority of the board of directors. Thus, applying that rule here, Bill is 1 of 4 members of the board of the corporation. In order to liquidate the corporation, he would need approval of the board of directors. In conclusion, Bill cannot force a liquidation of the corporation unilaterally, without the support of the other directors.

2. (a) The issue is who has authority to contract for the farm Black Acre. The rule is that no director of a corporation has authority to act unilaterally, instead, their decisions are subject to the board. Additionally, when a corporation makes a "fundamental change" the board of directors makes a recommendation and the change is subject to shareholder approval.

Here, Dora does not have authority, as a director, to sell Black Acre alone. Instead, she would need approval of the entire board of directors. Also, if this is considered a fundamental change--and selling off most of the assets of a corporation likely is--the change will be subject to shareholder approval.

In conclusion, the Board has authority to contract to sell the farm, upon receiving shareholder approval.

(b) The issue is what steps must be taken to sell Black Acre. The rule is that a director of a corporation cannot unilaterally enter into contracts for a corporation, instead, the board of directors must approve. To approve of any action, the board needs a vote from a quorum of the directors. The default rule is that quorum is a majority. For fundamental changes, the board will propose an action and must get approval from a majority of shareholders.

As such, Dora should call a meeting of the board of directors. She should propose that the board sell Black Acre and the board will vote. If a majority vote of the 4 directors vote in favor of selling the property, then the board may submit the issue for shareholder approval. It appears that 3 of the 4 siblings would like to go forward with the sale, which will be sufficient. A shareholder meeting will be called, at which a quorum must be present, and that quorum can vote on the sale. In conclusion, Dora needs to call a meeting of the board and the shareholders, and she needs to get a majority vote of shareholders to approve of the sale.

(c) The issue is what happens to the net proceeds of the sale from the farm. The rule is that sale assets first go to outside creditors, then to inside creditors, and any remaining proceeds are distributed to the shareholders. Here, the assets will go to the outside creditors, then inside creditors, if any. Finally, the board of directors will determine what portion of the assets should be distributed to shareholders.

3. (a) The issue is who has the authority to sell White Acre. The rule is that an LLC operates like a partnership, though they get the advantage of corporate limited liability. As such, any partner can enter into contracts pursuant to their implied duties for the LLC if it is in the normal course of their business. If the contract falls outside the normal course of an individual partners activities, the entire LLC will need to approve of the contract.

Here, Mary's will grants Dora the power to sell any LLC units and real property. Further, Dora is the manager of the LLC. Despite the provision in Mary's will, which may suggest that Dora can unilaterally sell the farm, the sale of the farm will need to be approved of by all the members of the LLC. In conclusion, all the members of the LLC need to approve of the sale.

(b) The issue is what steps need to be taken to sell the farm. The rule is that Dora needs to get approval by all the members of the LLC. here, Dora she should call a meeting of the members of the LLC for approval.

4. (a) The issue here is who has authority to sell the farm known as Green Acre, which is held as tenants in common. The rule is that tenants in common may individually sell off their share of the land to other people. Also, all the tenants in common could agree to sell the land to one single buyer.

Here, the will instructs that Dora has authority to sell the real property in the estate. As such, Dora can sell only the estate's interest in Green Acre (20%) without the consent of the other siblings. Dora could get the consent of all the siblings who are tenants in common and then they could all sell the entire (100%) farm.

(b) The issue here is what steps must be taken to sell the Estate's interest in the farm land. Because the will gives Dora the power to sell estate property, Dora can do so as the executor. Dora should, according to the instructions in the will to divide the residue between the siblings, give any interest equally to each sibling. In conclusion, Dora can sell the estate and give the interest to her siblings equally.

QUESTION 1 - Sample Answer # 3

1. Issue: Can Bill force a liquidation of Black Acre, Inc.?

Under Georgia law, corporations can only generally be dissolved upon an action by the secretary of state, by a majority vote of directors and shareholders, or in a bankruptcy proceeding. Here, the assets have not been distributed yet so Bill only holds a 10% interest in the corporation. As all three of his siblings are against him in this vote, he could only dissolve the corporation if he found some way for them to agree with him.

2. (a) Issue: Who has the authority to sell Black Acre.

The general rule is that corporations have any power that is not prohibited by law or by its charter. As such, corporations can sell and dispose of their property, enter into contracts, hire employees, and enter into other transactions that are deemed necessary for their business. As Black Acre is owned by the corporation, the corporation has the authority to sell the land. However, Black Acre is the corporation's only asset. It also must be noted that this is above the 2/3's threshold of assets for which Georgia law applies an irrebuttable presumption. Also, since it is unclear whether any revenue has been generated from the land, the 2/3 test for revenue seems to be inapplicable. As such, Georgia law places a prohibition on its sale. In order for a corporation to sell substantially all of its assets, it needs a majority vote of both directors and shareholders. Thus, the corporation only has the authority to sell Black if they receive the requisite amount of votes.

(b) Issue: What steps should be taken to consummate the sell and what percentage is Dora likely to receive from the shareholders.

Since Dora needs a majority vote from both directors and shareholders, she must go about holding a special meeting for such a vote. For such a vote, she generally needs 2 days notice for a meeting of directors and 10 days notice to shareholders. The time, date, and purpose of the special meeting should be given to all involved. Since all 4 siblings are directors, Dora seems to be likely to get 3 out of the 4 votes from the directors. Also since Bill only hold 10% of the stock, Dora seems likely to get 90% of the vote for the sale of Black Acre. However, Dora must remember that she stands in a fiduciary duty as an executor when voting her mom's 60% share. Thus, she must vote them in the best interests of all 4 children and not just herself. Here, the plan to distribute the proceeds from the sale is more beneficial to all of the children instead of just Bill who wants to continue farming the land. Bill will also still receive a benefit from the sale, and it does not seem to be self-dealing or a breach of fiduciary duty to vote for the sale. Thus, Dora is probably free to vote her executor's share for the sale.

(c) Issue: What would happen to the net proceeds of the sale of the farm?

Generally, the proceeds of a sale by the corporation go to the corporation. Under Georgia corporate law, there is no specific requirement to dissolve upon selling substantially all of the assets. However, a distribution of the proceeds as a dividend would likely leave the

company insolvent which is illegal under Georgia law. The corporation must either reinvest the money or choose to liquidate.

3. (a) Issue: Who has the authority to sell White Acre?

Under Georgia law, LLCs are generally treated like corporations in regards to the powers that they can exercise which are all those not prohibited by law or the operating agreement. Thus, White Acre would be able to be sold by its owner, the LLC. This would only be subject to the procedures that Georgia requires when an LLC sells substantially all of its assets.

(b) LLCs are even more restrictive on sale of substantially all of the assets and would require unanimous agreement among the members. It is unclear here who the members of the LLC actually are. Assuming all the siblings are members, Bill could effectively block the sale of White Acre. In order to sell this piece of property, the siblings would need Bill's cooperation.

If Georgia required a majority vote of members, the siblings could combine their 17.5% interest to vote to sell White Acre. It must be noted that the 30% interest controlled by Dora only has economic rights and not voting rights. Thus, Dora's executory interest could not be used in the vote.

4. (a) Under a tenancy in common, a owner of the interest in land cannot sell more than the interest that they actually have. Thus, no one tenant has the power to convey the entire plot of land. Thus, the tenants here could only sell their 20% interest in the entire plot. In this particular situation, all tenants in common would need to agree to a sale in order for the entire estate of Green Acre. Thus, the children working to together would only be able to convey an 80% interest in Green Acre while Bill would retain his 20% interest.

(b) In regards to the estate's 20% interest in the law, all of the siblings own an undivided interest in the 20% interest. However, partition of piece of property among tenants in common is a matter of right. Thus, Dora, as executor, could petition for partition in order to sell the property and allow Bill to keep 20% of the land. If the court could find an equitable way to divide the land, this could provide a solution. It would also allow the other siblings to join their 60% interest in the sale. Thus, the siblings could effectively convey 80% of Green Acre without Bill's right to the whole if partition is sought. If the land cannot be evenly partitioned, then there could be a forced sale of the property by the court and distribution. This could also meet the requirements of what the siblings want to do.

QUESTION 2 - Sample Answer # 1

1. The first policy proposal raises an issue under the Establishment Clause of the US Constitution. The Supreme Court has found state action to violate the Establishment Clause in two situations: where a law prefers one religion or particular sect over others, and when the law improperly affects religion in violation of the *Lemon* test. Under the *Lemon* test, a state action can survive Establishment Clause scrutiny only if it has a primarily secular purpose, has a principle effect that neither advances nor inhibits religion, and does not foster excessive entanglement between government and religion. If the state action conflicts with any of the three prongs, it will be struck down. The Court has found that cases involving public schools, such as moments of silence or prayers at graduations, frequently violate the Establishment Clause because they lack a primary secular purpose. Although the Chair is correct that legislative prayer has been held to be constitutional, prayer at school board meetings presents a very different question. The Court upheld legislative prayer by leaning heavily on its long history in American politics; school board prayer does not have that illustrious pedigree to protect it. Starting the meetings with a prayer would probably violate the secular purpose requirement of the Establishment Clause. Although school board meetings can be distinguished from in-school activities that influence students, the Chair would struggle to argue that a prayer serves a primarily secular purpose. Her argument about "traditional values" is similar to one rejected with respect to Ten Commandment monuments erected in a courthouse to reflect the legal underpinnings in McCreary County; a court will not take her words at face value, and will still likely find a religious purpose. That the prayer is nondenominational will make little difference, just as it did in the graduation prayer case. The overt religious nature of a prayer will undermine its purpose and lead to it being struck down.

2. The next policy raises whether a moment of silence would violate the Establishment Clause. As stated before, the Supreme Court is especially sensitive to Establishment Clause concerns in public schools. It has held that reading prayers over the intercom violates the *Lemon* test; it has also held that holding "moments of silence" in public schools violates the Establishment Clause. In both cases, the Court reasoned that the rules did not have a primary secular purpose. The Chair's proposed "period of silence" looks almost exactly like the moments of silence struck down by the Court in a past case. Moreover, she seems to be motivated by a desire to get around another constitutional ruling and continue to allow prayer in school. In *McCreary County*, the Court was skeptical to the state's attempt to wrap its religious motivations in a superficially-neutral garb by adding irreligious elements to a formerly religious monument, and could not find the requisite secular purpose. The Chair's silence period faces an identical flaw, and would likewise be unconstitutional.

3. The "moral values" course must also withstand scrutiny under the Establishment Clause. As before, a court would look either for preference among religions or a violation of the *Lemon* test when testing the policy. The moral values course faces a less serious problem under the *Lemon* test than the previous proposals. As a secular purpose, the County could highlight the rising disciplinary problems in its schools and its desire to reverse that trend. Teaching morals and encouraging discipline, while often in religious

flavors, should be sufficient to constitute a primarily secular purpose under *Lemon*. Next, a court, would ask whether the policy has a principle effect of advancing or inhibiting religion. The proposed course covers a diverse set of faiths and philosophies through the moral leaders identified, and only a few of those leaders are commonly classified as "religious." The presence of different religious views and additional irreligious views helps dilute any effect that the course would have on religion, and a court would consider the effect merely "incidental" and not in violation of the Clause. Finally, a court would ask whether the course fosters excessive entanglement with religion. Here, the course faces some problems: the Court’s earliest Establishment Clause cases frequently argued that religious teaching in school and having to monitor teachers to prevent right infringement created an excessive entanglement. In particular, the risk that a teacher's personal beliefs would be favored in class, and thus require monitoring, was of extreme concern. In this case, the monitoring required to ensure that instruction does not turn into proselytization would likely be substantial, and under Court precedent, this course would probably be found unconstitutional.

4. The holiday display proposal also presents an Establishment Clause issue, and again falls under the Court's *Lemon* test. The Court has had several occasions to evaluate the constitutionality of religious holiday displays under *Lemon*, and has found such displays to violate the effects prong except in cases where the religious message is sufficiently diluted by the presence of non-religious holiday symbolism. For example, the constitutionality of a nativity scene depended on whether it was surrounded by other symbolism, such as Jewish iconography, and especially images of "secular Christmas," such as Santa Claus or Frosty the Snowman. The constitutionality of the Chair's proposed scenes would depend entirely on their symbolic makeup; they will be upheld only if the imagery is sufficiently diverse to dilute a single religious message and if there is enough secular imagery for the purpose to appear secular rather than purely religious. Allowing teachers and administrators to choose the scenes themselves creates an entanglement problem: the school board will have to monitor their activities to ensure a diverse message, thus fostering entanglement with the potential religious messages. Further, the fact that these displays would still be in a public school, where the Court has been most consistently sensitive to the need to protect impressionable children from influence, also cuts strongly against this policy. Based on the case law and the key facts highlighted by the Court, this proposal would also very likely be found unconstitutional.

QUESTION 2 - Sample Answer # 2

1. Beginning each meeting with prayer is likely to be found unconstitutional. Under the 1st amendment, state actors are prohibited from endorsing religion because of the prohibition in the establishment clause. The establishment clause prevents states from advancing, endorsing or establishing an official religion. Such an endorsement of religion would be in violation of the ideals of church and state separation, and an individuals freedom of religion.

A school board meeting is state action. Beginning the meeting with prayer, even if non-denominational, advances religion. Prayers which come at the request of students without any school support is still unconstitutional because if occurs in the school setting. Students are even unable to request a non-denominational prayer to be held at graduation. Prayer in the classroom is an advancement of religion and is against the 1st amendment's establishment clause and will be struck down if challenged. It is of no matter that the prayer is voluntary, or that students may opt out of it.

The Georgia House of Representatives prayer falls within a narrow exception for the legislation. Their prayer by visiting clergy has been found to be so rooted in tradition and history, that it should be allowed. The same cannot be said for the school board meetings because they have no such history of prayer. If challenged in court, the proposition to have prayer in school will be struck down because it is a blatant endorsement of religion by the school and the school does not have a long history of prayer to overcome the challenge.

2. A classroom period of silence is likely to be found unconstitutional, again under the 1st amendment. When state action, which would clearly be the action of the school, is found to involve a potential advancement of religion 3 part test can be used. Is the action secular in purpose, does it advance religion, and is there excessive government entanglement with religion. The Chair's suggested a period of silence only in an effort to bypass a challenge to the morning prayer suggestion. The Chair's period of silence clearly doesn’t have a secular purpose if his intended goal is to place a religious activity, prayer, inside the classroom. His goal is to provide the class with an opportunity for voluntary prayer. Even if voluntary, the prayer will operate to advance religion. Government entanglement seems less of an issue in this instance, but the period of silence would likely not pass the test of secular purpose or advancement of religion. If challenged in court, the proposition to have a period of silence in school will be struck down because it is not secular in purpose and acts to advance religion.

3. The instruction of moral values, on its face, does not appear unconstitutional. However, such teaching when paired with deeply religious sources may created excessive entanglement with religion resulting in a finding of unconstitutionality. Using the same 3 part test as stated in response #2, the curriculum does have a secular purpose. The purpose is to instill moral values into students and ease disciplinary problems within the school. Enforcing moral values does not necessarily advance religion since morality and religion can be separated as two. The issue comes with the excessive entanglement of religion with a state actor. Here, the school is attempting to use historically notorious religious figures and use their teachings to promote a secular agenda. This seems to be too narrow of a line

to walk with constitutional certainty. The school will be placed in a position of censoring out religious ideals from the works of the religious authors and spiritualists. The school cannot reasonably be expected to teach students about the works of Buddha or Jesus Christ and not become overwhelmed by their task of promoting a secular message. Involvement to such a degree would certainly establish excessive government entanglement within religion. The curriculum will be struck down because using highly religious icons to promote a secular message would create excessive government entanglement with religion an have the secondary effect of advancing religious beliefs.

4. The placement of religious symbols within the school can be done, but as suggested, would be an unconstitutional endorsement of religion against the 1st amendment's freedom of religion clause. The Chair suggests that displays included more than one religion or at least one secular symbol/scene. Such a minimal level of diversity is likely not enough to counter the school's endorsement of religion. Courts have struggled in the past with challenges to nativity scenes in public parks. Such challenges has survived because the nativity scene was one of many scenes including traditional commercial images such as fictional Christmas characters and scenes and symbols of other religions. Similarly, a park which boasts a religious icon is likely to survive an challenge only if it the park is also adorned with many other symbols of diverse icons. The key in these scenarios is that the scenes must not be used to endorse religion, but only to endorse a season of the year or general celebration of diversity.

As is, the schools displays will be found as unconstitutional if they are only rivaled by 1 secular scene or symbol. The school would need to increase their diversity to include many more secular images and alternative religious icons and scenes. Ultimately the school would need to be found not advancing a religion, but advancing a seasonal celebration with is secular in nature, or found to be promoting a multitude of holiday traditions in the name of diversity.

QUESTION 2 - Sample Answer # 3

1. Can the board began each meeting with a nondenominational prayer, or does this violate the establishment clause of the first amendment of the US constitution applied by the 14th amendment?

In determining if a law violates the establishment clause, the US Supreme Court has laid out a three part test known as the lemon test. The law will be valid if it has a secular purpose, the primary effect is does not advance nor inhibit religion, and it does not excessively entangle the government in religion. The US Supreme Court has particularly scrutinized laws or rulings that involve the public primary school system due to the impressionability of young people. The court has struck down non-denominational invocations at graduation and other events as violations of the establishment clause. Requiring a non-denominational prayer advances religion over secularism on its face even if it does not advance a particular religion. The primary effect of the prayer is to advance "traditional values" which could be read as advance religion. And, even having a school board determining what is nondenominational excessively entangles the public school with religious doctrine. It is true that the Court has upheld prayer in a legislative session; however, that does not involve impressionable children that will feel excluded from inclusion. Therefore, this provision will likely not past constitutional muster and would be overturned if challenged as such.

2. Can the board constitutionally institute a two minute moment of silence for meditation or voluntary prayer?

The Lemon test will also apply to this provision. The court has given a little bit more leeway when it comes to moments of silence so long as it is not a pretext to instituting prayer in public schools. A two minute moment of reflection at the beginning of the day would not, in and of itself, violate the secular purpose provision of the Lemon test. However, the stated reason for the two minute moment of silence includes both mediation and prayer. Given that this comes on the back of the "return to traditional values," this is likely a pretext to including prayer in public schools. This will likely fail the secular purpose portion of the Lemon test, and while not definite, likely would not stand up to a constitutional challenge.

3. Can the board institute instruction in moral values based in part on religious leaders and still be within the bounds of the establishment clause of the Constitution?

Inclusion of religious leaders, prophets, founders, or mention of religious doctrine itself does not by itself violate the establishment clause. However, such mention of religion must be in an educational and historical context and must not show support for any one religion, or religion in general. The fact that these religious figures are included in a moral values instruction would not by itself violate the establishment clause. However, the tone likely does in that it is "moral values" instruction. This does not suggest a solely educational and historical context. This appears to advance these leaders as moral authority which goes beyond the permissible realm of public education. Further, while Nelson Mandela, Gandhi, and Martin Luther King, Jr., four of the figures are from religious doctrine. The board could

defend that it represents a broad spectrum of religious doctrine. However, the fact that the majority of the figures are religious coupled with the concept that this is a "moral values" instruction likely overcome any claim that it is educational and historical in nature. Therefore, it will violate the establishment clause of the first amendment as applied by the 14th.

4. May the school reinstitute holiday decorations that include religious symbolism and imagery if it includes more than one religion or at least one secular scene or symbol. The Court has upheld a public nativity scene as part of a broader holiday decoration theme inclusive of other religious symbols such as menorahs and secular imagery such as Frosty the Snowman. The Court looked to the totality of the circumstances. The board may be able to permit a return to celebrating the December religious holidays, but the scheme as suggested may not be enough to stay clear of an establishment clause violation. As written, the ruling would allow for one religion to dominate the display which could cause children to feel excluded. For instance, if a single menorah were held along with multiple nativity scenes, Christmas trees, and other Christmas-centric imagery, any non-Christian student would likely feel excluded which would violate the establishment clause. The single menorah confronted with such a plethora of other imagery would not do enough to mitigate this. Further, a single secular image such as a Frosty the Snowman or some other non-religious winter symbol would likewise do little to mitigate a plethora of religious symbolism. While it may be possible to have recognition of the December religious holidays, by a totality of the circumstances, the suggestions as currently made would violate the establishment clause of the Constitution as applied by the 14th amendment.

QUESTION 3 - Sample Answer # 1

1. May Juliet and Romeo seek a divorce from each other as a married couple?

(a) Did Juliet and Romeo have a common law marriage?

In order for a couple to be divorced, they must have first been married. According to the statute, common law marriages entered into prior to 1997 will be recognized as valid marriages. This assumes all other requirements are met. In order to be a common law marriage, the couple must hold themselves out as a married couple. The two must each assent to an agreement to be married. And, the two must co-habitate which requires more than just being roommates. The two must consummate their marriage. Georgia favors legitimacy of children. At the time of Juliet's first pregnancy, there seems insufficient holding out to be considered a marriage. And, the home was put in separate family names. However, after, the two signed a joint pledge to be husband and wife which would be an agreement as such. From that time, the couple has held themselves out in Juliet's job as well as on tax information as husband and wife. The couple's joint account listing them as Mr. and Mrs. further evidences a holding out as married. After the first children, there is nothing evidencing further consummation; however, there is nothing suggesting otherwise. The two most likely had a valid common law marriage which occurred in 1989 prior to 1997.

(b) Did Juliet and Romeo have grounds for divorce?

Adultery is grounds for divorce. However, if both parties are guilty of the same wrongdoing, it will offset the offense. A condonation occurs when the one party forgives the infidelity and the two resume a cohabiting marriage. Georgia also recognizes as grounds for divorce the catchall of a marriage that is irretrievably broken. Both parties committed an adultery which would be grounds for a divorce. However, the parties reconciled after Juliet's divorce. The parties did not reconcile after Romeo's. Further, the parties could still claim an irretrievably broken marriage as grounds. The couple can get divorced

2. May Juliet or Romeo seek and obtain alimony from one another or receive an equitable distribution of the property?

Alimony is available as a payment from one party to another to maintain the standard of living of a party that would be disadvantaged by the divorce. Courts will look to all means of support. Alimony can be temporary to provide for the party long enough to gather the education and experience sufficient to support themselves. Alimony can also be permanent to provide permanent support to the individual. Alimony can be a lump sump or period payments. Alimony is different than equitable distribution in that equitable distribution decides the allocation of marital property between the parties where alimony is a payment regardless of the distribution of property. Alimony will not be available to a party who has committed adultery. A condonation may cure the adultery where there has been a reconciliation and return to cohabitation, but still may be a consideration. With equitable distribution, adultery, or other marital misconduct will be a factor, but will be determinative

in the equitable distribution of property. Equitable distribution considers all contributions to the marriage, not just financial.

Juliet appears to be the breadwinner even though retiring early. The facts suggest that she has worked most of the marriage while Romeo has been the homemaker. This goes against Juliet getting alimony and in favor of Romeo receiving it. However, Romeo has an alternate means for caring for himself due to the trust fund. Each party's adultery may be a bar to alimony. Juliet's was reconciled though. Romeo's was not. Romeo will not be able to receive alimony for this reason. In determining an equitable distribution of the property, each party's affairs will be a consideration. Juliet's being condoned will likely entitle her to a larger share since Romeo's was not, but it will not bar Romeo from an equitable share. Romeo's being a homemaker and taking care of the children will be considered in his contribution to the marriage increasing his share. Neither party will likely receive alimony, but each will have a share in the equitable distribution.

3. Are Romeo's trust distributions relevant to the determination of alimony or child support?

Alimony and child support look to gross income, income derived from all sources. Child support measures each spouse's income derived from all sources and uses a formula inclusive of time spent as custodial parent to determine child support payments. Even though Romeo does not have title to the trust principle, Romeo does receive regular payments. These payments will be considered income. This income will reduce his alimony payments as he can better care for himself using these payments. And, the payments will increase his child support obligation should he be found as the non-custodial parent.

4. What use, if any, may Juliet make of the audio and video recordings of Romeo's affair?

Under the Georgia wiretapping statute, only one party to the recording must be aware that a recording is being made. If no parties to the recording are aware of the recording, this violates the statute and the evidence is inadmissible, without a warrant. Where there are two parties, and one party is aware of the recording, the aware party is under no obligation to disclose to the unaware party of the recording. The statute covers both video and audio recordings. The only person that was aware of the video recordings was Juliet, not either Romeo or the babysitter. Because neither party to the video recording was aware of the recording, the recording will not be admissible as evidence. However, with a telephone recording, even though Juliet was the only party aware of the recording, it will be admissible. Juliet was under no obligation to disclose to Romeo that she was recording since she was a party. The video recording will not be admissible, but the telephone recording will be.

QUESTION 3 - Sample Answer # 2

1. Either Juliet or Romeo may seek a divorce. At issue is whether Juliet and Romeo established a common law marriage. Under Georgia law, a common law marriage is formed when a man and woman live together for at least 10 years and hold themselves out to the public as husband and wife. Although common law marriage was abolished in Georgia in 1997, common law marriages formed prior to 1997 are still valid. Here, Juliet and Romeo first rented a home together in 1986 and lived together until Juliet moved out in 2014. They lived together for eighteen years. They purchased a home in both of their names in 1989. They signed the joint pledge card at their church as "Husband" and "Wife." They established a joint checking account as Mr. and Mrs. in 1989 and, from that point forward, paid their home expenses out of that joint account. They filed a joint tax return in 1990. As part of the security clearance process to get her job at the Communicable Disease Center, Juliet disclosed Romeo as her husband. Juliet and Romeo attended marriage counseling together. These facts show that Juliet and Romeo held themselves out to the public as husband and wife and, therefore, established a valid common law marriage prior to 1997.

Under Georgia law, either spouse may seek a divorce, which can be on fault or no-fault grounds. Adultery would constitute fault as grounds for divorce in Georgia. However, if the parties reconcile after the adultery, it may not be a valid ground for divorce. Irreconcilable differences would constitute a no-fault ground for divorce. Here, both Juliet and Romeo committed adultery. They reconciled after Juliet committed adultery in 2008. After Romeo committed adultery, Juliet moved out immediately upon returning home from her trip. Therefore, Juliet may seek divorce on the grounds of adultery, but either spouse may seek a divorce on no fault grounds, such as irreconcilable differences.

2. At issue is whether Juliet or Romeo may seek and obtain alimony or equitable division of property.

<u>Alimony</u>

Neither Juliet nor Romeo is likely to receive alimony. At issue is whether Juliet or Romeo may seek and obtain alimony. Under Georgia law, a spouse may be barred from receiving alimony if he committed adultery. However, if the parties reconcile after the adultery, this may not be a bar to alimony. Alimony can be either permanent alimony or rehabilitative alimony. In awarding alimony, courts will consider the assets of each individual, their earning potential, their age, their physical condition, and their ability to get a job. Here, both Juliet and Romeo worked as agricultural scientists for several years. Juliet now works as a researcher at the CDC. Romeo undertook the domestic duties of a stay-at-home father. Romeo receives discretionary distributions from a trust established by his father for Romeo's support, maintenance, and education. Juliet likely cannot seek alimony because she is currently working as a researcher. As a stay-at-home father, Romeo may be entitled to alimony, but the assets he receives from the trust are likely too large for the court to order Juliet to pay him alimony. Therefore, neither Juliet nor Romeo is likely to receive alimony.

Equitable Distribution

Both Juliet and Romeo may seek and obtain equitable distribution of property. At issue is whether Juliet or Romeo may seek and obtain equitable distribution of property. Under Georgia law, upon divorce, all marital assets are subject to equitable distribution of property. This means the court will divide the assets fairly, taking into consideration marital fault, child custody, the assets of each spouse, and the value of the marital assets.

Here, Romeo was working as a researcher from 1986 to 1989. Juliet took a job as a researcher at the CDC in 1989. The couple has three children. They purchased a home in both their names. Romeo receives trust distributions, which he deposits in their joint checking account. The money in their joint checking account would be considered marital property because it is in both their names and it is used to pay their joint home expenses. The home would also be a marital asset. Juliet and Romeo both committed adultery, but, as discussed above, Romeo reconciled with Juliet after her adultery and therefore Juliet's adultery would not be fault grounds for divorce. Juliet, on the other hand, moved out immediately upon learning of Romeo's adultery. It is not clear who would retain custody of the children upon divorce. The court will consider who has custody of the children and any child support payments that will be required in making its determination. Both Juliet and Romeo will obtain equitable distribution of property, but that does not mean that the distribution will necessarily be equal.

3. The trust distributions to Romeo are relevant to a determination of alimony or child support. At issue is whether the trust distributions to one spouse are relevant to a determination of alimony or child support. Under Georgia law, in making a determination regarding alimony or child support, the court will consider all marital assets as well as the assets of each individual spouse. Here, Romeo receives trust distributions from a trust set up by his father. He deposits those distributions in his and Juliet's joint checking account, out of which they pay their joint home expenses. Because Romeo deposited the distributions in their joint checking account, they will likely be considered marital property. The distributions Romeo has yet to receive will be considered his separate property. Both marital property and separate property is relevant in making a determination regarding alimony or child support. Therefore, the trust distributions to Romeo are relevant to a determination of alimony or child support.

4. Juliet may use the audio recordings as evidence in the divorce action but not the video recordings. At issue is whether one party may record another without their permission. Under Georgia law, the consent of at least one of the parties being recorded is necessary for the recording to be legal. Here, Juliet recorded Romeo and Sitter in her home. She did not have the consent of either party. She also recorded a conversation between her and Romeo. Juliet, a party to the conversation, consented to the recording. It is irrelevant that she told him she was not recording because the consent of only one party is enough. Therefore, Juliet may only use the audio recordings as evidence.

QUESTION 3 - Sample Answer # 3

Based on GA statue, common law marriages prior to January 1, 1997 are still held valid marriages. Juliet and Romeo held themselves out as being a married couple as early as 1986. They moved in together, the paid their joint expenses with their separate earnings, and they had children, and even referred to each other as 'husband' and 'wife." Their relationship is evidence of a valid common law marriage under GA law.

Because their marriage was prior to January 1, 1997, they are validly married and, therefore, entitled to a valid divorce. Both Juliet and Romeo are entitled to the same distribution of property according to GA laws as they would be had they entered into a marriage post 1997. This entitles either Romeo or Juliet to alimony, child support, child custody, and equitable marriage distribution pursuant to GA law. Alimony can be awarded to either spouse and is determined on a fact-specific basis. A court will consider that Romeo is no longer working along with the income generated from the prior years when he was. A court will consider the fact that they both have been employed in the past and carry similar skills set. This is relevant to their employability and particularly, Romeo's chance of gaining future employment. A Court will look at the standard of living that the household has been accustomed to, the educational background of either spouse, the income generated from each spouse, the expenses of the household, the contribution of Romeo's duties at home to the wealth of the household, etc. This is not an exhaustive list of the factors that the Court will look at to award alimony.

A GA Court will also employ the doctrine of equitable marital property distribution when they separate property. Anything acquired prior to the marriage will go to the separate spouse and any along with any inheritance or bequest. Anything was acquired during the marriage, will be considered distribution.

A GA Court will distribute 'marital' property in the way they deem most reasonable based on the specific circumstances of the household.

Both Romeo and Juliet have complained about extra-marital affairs during the marriage. This is relevant in determining whether either party will be eligible for alimony. As stated above, either spouse is entitled to alimony based on the financial position of the party. Since Romeo has not been working for sometime, he may be compensated for his contributions to the household in a way that is consistent with the standards and lifestyle of their marriage. With that said, any fault or claim of adultery will bar a spouses chances of alimony. A Court will also consider adultery when splitting property in GA jurisdiction. Romeo claims that Juliet had an affair during the marriage, however, it is not the reason for their divorce. The facts indicate that they went on to reconcile their differences through counseling. This would prevent Romeo from bringing any adultery claim. As for Juliet, she may have a valid defense to Romero's claim for alimony. Because she is coming to us claiming by Romeo's affair is reason for separation. Romeo may be barred from alimony if valid. Again, if true, Juliet will not have to pay alimony if her claim of adultery is valid and reason for divorce. A GA Court will also consider the fault of the party when they distribute joint property.

Normally, a trust is considered a personal bequest or inheritance and is not subject to equitable marriage distribution. In this circumstance, Romeo's deposits from his trust to their joint bank account likely constitutes income more than an inheritance. GA Courts determine that any separate income that is later used for joint purposes are significantly improved with joint efforts, will be considered joint property. Because of that, Romeo's deposits will be valid when a Court considers alimony and child support. It does not specify the amount that is deposited, nor does it specify the proportion in comparison to Juliet's deposits. This will be relevant to determine alimony and child support. Because it is in Romero's name and he is not currently working, it may just be considered to offset whatever alimony payment Juliet would be required to provide. Again, depending on the amount. Because of the adultery claim, and depending on the total value of assets within the household, Romeo could be ordered to make alimony payments and child support payments from his trust.

Lastly, Romeo's threats towards Juliet are not valid. A person does not have any expectation of privacy grounds against a private person. Romeo will not be able to make a claim against Juliet for illegal surveillance of him for purposes of the 4th Amendment. Additionally, Juliet will likely be able to use the video recording to establish her claim for adultery against Romeo. The voice recording of their telephone conversation will be additional evidence not subject to any spousal immunity. Normally, Romeo may be able to keep Juliet from testifying against him as to private conversations they had during the marriage. Though they are still married, spousal privilege does not apply when the claims are against the spouse. Conclusively, Juliet will be able to use both, the video and recording for purposes of establishing her claim. Romeo will not be protected by any constitutional right or privilege and any hearsay objection will likely be overruled. Romeo is also incorrect as to his liability for alimony and child support as a result of his unemployment.

QUESTION 4 - Sample Answer # 1

1. Plaintiff ("P") could assert four different theories of liability against Defendant ("D"): premises liability, animal ownership, negligence, and possibly contract.

The first would be based on a premises liability theory. A landowner owes a heightened duty of care to invitees-people who enter the property with a business purpose. The heightened duty requires the landowner to seek out and warn against danger on the property. Arguably, a dog that barks, growls, snaps, and lunges could be viewed as a dangerous thing on the property, thus warranting at least a warning to stay away from or not provoke.

A second theory is based on the ownership of the animal. Normally, an owner is not liable for the actions of their domestic pet, but will be liable if they know or have reason to know that their animal has violent propensities. Growling, snapping, lunging, and barking all suggest an aggressive dog. While the owner claims that the dog has not attacked anyone before, which would have triggered liability, it is arguable that the owner should have known it had violent propensities and taken more care to restrain the dog.

The third theory is based on negligence. Negligence requires showing that D owed a duty to the P, D breached that duty, and that the breach was both the cause-in-fact and the proximate cause of P's damages. Here, P was a business invitee of P. He owed a duty of care to the invitee. D breached that duty with his decision to lock the gate with a stick when a padlock was available. Even if it was not a breach to use the stick, P could argue res ipsa loquitor to meet the breach element, in that the stick/dog was in D's exclusive control, and that the gate coming loose was not something that occurred in the absence of negligence. The dog literally caused P's injuries, thus, but for the dog attacking him he would not have been injured. Further, the dog was showing violent propensities-growling, lunging, barking, and snapping, thus it was reasonably foreseeable that the dog would attack P. Finally, P was bitten on his arms and legs, suffering harm and damages.

Plaintiff may argue he was the third party beneficiary to the contract between his employer and D if he is no longer able to work or is taken off of the job at D's place.

Plaintiff may also have a claim against his employer for workers' compensation, assuming he was not an independent contractor.

2. D can raise several defenses to P's theories of vicarious liability.

First, regarding dog ownership, an owner is generally not liable for the acts of their domestic pets. The owner swears that the dog as never bit anyone before, and Georgia allows for a first bite in the apple. Thus, until an owner knows or should know their pet is violent/dangerous, they will not be liable. The dog has never attacked before, so that is a good defense to raise.

Against a claim of negligence, D could note that the stick had been used successfully to keep the gate closed many times before. Thus, it could be unforeseeable that the dog would break the stick. Further, against a claim of res ipsa loquitor, D could argue that the dog was not under his exclusive control and that plaintiffs using that theory cannot be contributorily negligent in bringing out the result, which P likely was by spraying and inciting the dog.

D may also argue that P assumed the risk of spraying the property, because he voluntarily sprayed the outside of the house with the dog outside, rather than wait for D to bring the dog inside like he waited for the dog to be penned up outside while he sprayed the inside of the house. Further, this was not the first time he had sprayed this house, so he assumed the risk voluntarily, knowing how the dog had behaved before.

In addition, D should raise P's own negligence in inciting the dog. Georgia is a comparative negligence state. Thus, P's recovery will be reduced based on his respective negligence. P sprayed the dog with bug spray, leading to the "frenzy."

Next, regarding a premises liability claim, D could argue that the danger of the dog was open and obvious-alleviating any need to act beyond what he did to further warn P.

Finally, regarding P's claim that he was a third party beneficiary of the contract between D and P's employer, D can argue that P was not an intended beneficiary, because both parties to the contract have to intend to benefit that person in making the contract. Rather, P was likely only an incidental beneficiary of the contract, and thus would not be entitled to sue for any contract damages arising from the attack or ability to work on the contract.

3. The existence of a "leash law" being in effect that applied to this situation would affect the analysis of this claim. By violating a statute, the dog's actions would qualify as negligence per se if P could show the statute was enacted to protect harms like occurred here and that he was the class of intended persons to be protected. Thus, P would have to argue those two things, and if he could show them, he would win against D, because D would be negligent per se. The type of harm will probably be easy for P to prove-dog attacks, although the leash law would have to apply to penned up dogs, not just dogs outside. As for the class of victims, it is arguable that P applies as a business invitee.

QUESTION 4 - Sample Answer # 2

1. Plaintiff Bill Jones can proceed on a negligence theory against defendant Arthur Smith. The elements of such a theory require a showing of (1) duty, (2) breach, (3) causation and (4) damages. There are a number of negligence causes of action that might prevail for Jones, including the duties of landowner's for dangerous conditions on their land and also the duty of all persons to act in a reasonable manner.
Here Jones was on Smith's land as an invitee in order to confer a material benefit, which gave rise to heightened duties for a landowner. Smith was under a duty to take reasonable steps to safeguard the premises from known dangers and inspect for unknown dangers. Budro's actions on Jones' previous three visits gave Smith notice that Budro had a known dangerous propensity, and his failure to adequately contain his animal directly caused the injuries suffered by Jones. Smith should have been vigilant to safeguard Jones and his failure to do so was a proximate and actual cause of Jones' injuries. For this reason, Jones might recover against Smith as a landowner.

In addition to failing his duties as a landowner, Smith also breached his duty to act with reasonable care toward persons foreseeably injured by his actions, also on negligence theory. Smith's failure to adequately secure the backyard pen was a direct cause of Jones' injuries, as Budro was able to escape and harm Jones while he performed his work. Especially given Smith's subsequent locking of the pen with a padlock, it was unreasonable for Smith to secure the pen with a flimsy stick found on the ground. He should have used the padlock the first time and prevented Jones' injuries. His failure to act reasonably in securing the pen was the cause of Jones' injuries.

In addition to arguing that securing the pen with a stick was negligent, Jones should argue that Smith's ownership of Budro is itself a negligent act that endangers all who come to his home. Jones should argue that Budro's assaults on visitors are unreasonable and Smith's failure to properly secure or train his dog is a danger to his visitors and neighbors. This theory may work in the alternative if a negligence case based of faulty securing of the pen is unsuccessful. On this theory, Smith would be liable for any injury caused by Budro because Smith's ownership of Budro is unreasonably dangerous.

2. Smith will attack the case-in-chief by arguing that Budro had never bitten anyone before and thus he had no notice that such an injury was foreseeable. Generally, a pet owner is only liable for injuries caused by the animal after they know of its dangerous propensity. This is contrasted to wild animal owners, who are strictly liable for injuries caused by their animals. Because Budro had never bitten anyone before, Smith was not aware of his dangerous disposition. However, Jones can put on evidence of Budro's past behavior to rebut this defense and show that Smith knew of the dangerous propensity of Budro when he put him in a pen on four occasions.

Also, Smith might argue that by course of conduct, Jones assumed the risk of dog bite by knowingly entering his land after three previous encounters with Budro. Knowing the risk, and knowing that a dog pen might not contain a dog in every instance, Jones entered the

land cognizant of the risk. Because he proceeded in the face of a known risk, Jones assumed the risk of injury by Budro.

In addition, Smith will assert comparative negligence. By spraying the dog with pesticide, Jones exasperated the dog's condition and caused it to escape the pen and bite him. This contributed to Jones' injury, and a jury might find that Jones actions were a substantial contributor to the injuries he suffered. If this defense succeeded, Smith's liability would be lessened to his percentage of fault. However, Jones will argue that his spraying of the dog would have had no effect but for Smith's faulty securing of the pen.
Smith will also argue that Jones' actions were a superseding cause that relieved him of liability, since the spraying of the pesticide on the dog was unforeseeable and was a direct cause of Jones' injuries. Smith would argue that Budro was only able to escape the pen because of his anger at being sprayed with a harsh chemical, and that Budro would not have escaped but for Jones' actions. In such a case, Smith might be relieved of all his liability.

3. If a leash law were in effect, Jones could use that statute as a grounds for asserting negligence *per se* against Smith. To prevail on a negligence *per se* theory, the plaintiff must show that he is among a class of people intended to be protected by a statute, that the defendant violated the statute, and that as a result the plaintiff suffered the sort of harm being protected against. Because a leash law is intended to protect the public from dogs, and Jones suffered the very harm sought to be protected against, he can argue that Smith's failure to properly secure his dog was both a violation of the statute and constituted negligence *per se*. This would ease the requirement of showing negligence during Jones case against Smith. It would also negate Smith's arguments that he acted reasonably or that he could not foresee the kind of damage that affected Jones. The statute would act as evidence supporting Jones' negligence claim.

QUESTION 4 - Sample Answer # 3

Theories of Liability

The plaintiff could assert a negligence claim against Defendant for his personal injuries caused by the pit bull. A negligence claim requires a showing of 1) a duty owed to the plaintiff; 2) a breach of that duty; 3) cause-in-fact and proximate causation; and 4) damages.

Here, the plaintiff would be classified as an invitee because he was on the premises for a business purpose--to complete extermination pursuant to a contract between Defendant and Plaintiff's employer. The duty of care owed by a defendant to an invitee on his property is the duty to inspect and make the premises safe. Thus, Defendant had a duty to ensure that his home and yard were safe from dangers caused by his dog. Defendant breached that duty because he failed to ensure that the dog, who he had reason to know could be dangerous, was properly confined. Instead of properly closing the latch on the gate, Defendant simply secured it with a stick he found lying nearby, which did not meet the required standard of care. This was a cause-in-fact of the Plaintiff's injuries; if Defendant has properly secured the gate, the dog would not have been able to break the stick, thus unlatching the gate and letting him out. It was also a proximate cause of the Plaintiff's injuries because no superseding events precipitated the attack. Finally, the damages caused in this case are clear because Plaintiff suffered severe physical injuries from being attacked by the dog.

The plaintiff could also assert a strict liability claim against Defendant for keeping an animal with known dangerous propensities on his property, pursuant to GA's "dangerous dog" statute. Under that theory of liability, Defendant would be responsible for injuries caused by keeping the dog on his property regardless of whether he exercised due care in restraining the animal. Here, although the dog had never bitten anyone, every time the plaintiff visited, the dog would growl, snap, and lunge at the door, which was sufficient to show his dangerous propensities although he had never bitten anyone. Because the plaintiff suffered injury as a result of the dangerous animal, under a strict liability claim he can recover even without a showing of negligence on the part of Defendant.

Defenses

As to the theory of negligence, Defendant could assert that Plaintiff was contributorily negligent and contributed to his own injury. Because GA is a modified comparative negligence state, negligence on the part of the plaintiff is not going to bar his recovery unless it was equal to or greater than that of Defendant, but it can reduce his recovery according to the degree of Plaintiff's negligence. Here, Plaintiff contributed to his own injury when he provoked the dog by spraying him with bug spray. However, Plaintiff would likely argue that spraying the dog did not proximately cause his injury, as the dog was already angry, snarling, and lunging when he sprayed the dog and may well have attacked anyway.

As to the theory of strict liability, Defendant could assert that Plaintiff assumed the risk,

meaning that he knew and understood the risks of performing work on Defendant's property and the risks of the dog's behavior, and yet voluntarily chose to encounter those risks. As Plaintiff had come to Defendant's house several times before, and the dog had growled and lunged at him every time, it is clear that Plaintiff knew what kind of behavior to expect from the dog yet still chose to squirt the dog with bug spray while he was already angry. This could be deemed assumption of the risk.

Defendant also seems likely to assert the defense that the dog has never bitten anyone before, but this does not matter since the dog has clearly shown himself to be dangerous despite never having previously bitten.

Effect of a Leash Law

If a leash law had been in effect at the time of the injury, the fact that Budro was not on a leash at the time Plaintiff was hurt would assist him in proving a negligence claim because it would be negligence per se, which arises from violation of a statute such as a leash law. Negligence per se is helpful to a plaintiff because it can help him to establish that a defendant both owed him a duty and breached that duty. However, it only applies if Plaintiff was a member of the class the statute was intended to protect, and if the injury he suffered was of the sort the statute was intended to prevent.

Here, if a leash law had been in place, such a law would have been intended to help protect people like Plaintiff from injuries caused by a dog who is not kept under control. The injuries Plaintiff suffered from dog bites would be the sort of injury a leash law would be meant to prevent. Thus, a leash law would assist the Plaintiff in bringing a negligence claim; however, it would have no effect on a strict liability claim. Moreover, a leash law may not apply to animals kept solely on an individual's own property.

MPT 1 - Sample Answer # 1

To: Steve Ramirez
From: Examinee
Date: July 29, 2014
RE: Kay Struckman consultation

MEMORANDUM

I. KAY STRUCKMAN MAY ETHICALLY MODIFY RETAINER AGREEMENTS WITH EXISTING CLIENTS TO INCLUDE A PROVISION REQUIRING BINDING ARBITRATION IF CERTAIN CONDITIONS ARE MET.

In determining whether our client, an attorney may ethically modify retainer agreements with existing clients, the following conditions must be met: (I) the terms are fair and reasonable and are fully disclosed to the client in a manner that the client may reasonably understand; (ii) the client is advised of the desirability of seeking independent legal counsel and is given opportunity to seek legal counsel; (iii) the client give informed consent in a writing that is signed by the client. *Franklin Rule of Professional Conduct 1.8.*

A. Fair and Reasonable Terms

Rule 1.8 of the Franklin Rule of Professional Conduct requires terms of a business agreement, such as a modification of an existing retainer agreement, to be fair and reasonable so as to adequately explain the enforceability of the agreement with regard to the circumstances creating the fiduciary relationship between the attorney and client. Lawyers bear the burden of demonstrating the reasonableness and good faith of the agreements they enter into with their clients; thus, it is necessary to properly explain contractual terms to clients who possess a less sophisticated understanding of the law and its implications and therefore must fully rely on their attorney's advice. *Columbia State Ethics Opinion 2011-91.*

In the case of *Lawrence v. Walker,* a client successfully proved that the retainer agreement she entered into with her attorney contained unenforceable binding arbitration provision because the terms were ambiguous and the court should not find that the client entered into the agreement knowingly. The arbitration agreement in *Lawrence* left the client guessing as to whether the agreement contained binding arbitration of legal malpractice claims or not, thus rendering the contract unclear and in violation of the fiduciary duty all attorneys must afford their clients. Such an ambiguity in the language alone may be reason to conclude that the client cannot voluntarily enter into the agreement because the terms are not fair and reasonable. *Id*.

An attorney in *Sloane v. Davis* adequate incorporated a biding arbitration agreement with her client because the court found that the attorney made a full disclosure in writing that was easily understandable to the client. In *Sloane*, the attorney orally explained the retainer agreement, including the arbitration clause and furthermore provided a brochure detailing

the nature and benefits of arbitration as well as the legal rights one effectively waives when one elects to arbitrate a dispute. The court held that the attorney met the obligations under Rule 1.8 and the binding arbitration agreement was thus enforceable because the attorney explained the terms clearly.

In the instant case, attorney Struckman has informed our firm that her clients are asking for such arbitration agreements and, because attorney Struckman desires to do right by her clients, she has drafted a proposed arbitration provision to include in existing retainer agreements. The terms are not very clear, and, like the client in *Lawrence*, attorney Struckman's clients may not be able to discern whether the provision, as proposed, requires arbitration for malpractice claims as stated in its terms, "any claim or controversy". Professional ethics will not tolerate arbitration of malpractice claims. Such a proposition risks being deemed as unfair and unreasonable under the circumstances because attorney Struckman's client-base consists of mostly small businesses and individuals who do not have access to in-house counsel and are therefore not as readily able to understand the effect that such a provision may have on the circumstances regarding their legal needs which created the fiduciary relationship with attorney Struckman. A client is waiving her right to a jury trial among other legal rights, and it is a responsibility of the attorney as a fiduciary to fairly and accurately disclose to the client in writing so that a client may understand the terms.

As the proposed provision stands, it will fail to be ethically enforceable unless the terms are edited to fair and reasonable so that attorney Struckman's clients will understand the legal effect that such a provision will have on their legal rights in the event of a dispute with attorney Struckman. Before incorporating such a provision as a modification into the existing retainer agreements with her clients, Struckman must edit the provision to clearly explain what legal rights of her client she intends to limit by means of enforcing the arbitration term. Terms applied to such disputes such as "fee disputes only" would shed light on the meaning of the term "claim or controversy" and give the client a better understanding of what effect the contract will have on her legal rights. Furthermore, attorney Struckman should have a meeting with her existing clients whose retainer agreements are to be modified in order to properly, in accordance with Rule 1.8, explain the nature of arbitration and provide a writing dictating the nature of such an agreement. These measures will provide fair and reasonable circumstances in which attorney Struckman's clients may agree to the modifications.

B. Opportunity to Seek Independent Legal Counsel

Rule 1.8 as well as the Columbia State Ethics Opinion 2011-91 make it clear that a requirement, and therefore a common condition to the ability to ethically modify a retainer agreement with an existing client is that the attorney must urge the client to seek the advice of independent counsel concerning the agreement. The attorney must also give advice to seek legal counsel, such as in the case of *Sloane v. Davis.* In *Sloane*, the attorney sent a brochure to the client explaining the nature of arbitration and further explained that her client should seek the advice of another attorney before signing a retainer agreement containing an arbitration provision. The client did not in fact seek legal counsel, but the

attorney was found to have adequately made a full disclosure with respect to informing the client of the desirability to obtain independent counsel.

Struckman must explain the desirability of seeking independent counsel with regard to any modification proposing a binding arbitration provision in her retainer agreements. Attorney Struckman must afford her clients an opportunity to seek such advice, such as the attorney in *Sloane* did. Although the Columbus State Ethics Opinion 2011-91 concedes that it is unrealistic to expect a client to pay for independent counsel, it is not required that the client actually seek independent counsel; it is however, required that attorney Struckman explain to her clients the desirability of such counsel and to give them the opportunity to do so.

C. Informed Consent

In accordance with Rule 1.8, is it necessary for attorneys to obtain informed consent from their clients in a writing wherein the client is consenting to the terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. The attorney in *Sloane* obtained informed consent after fairly and reasonably disclosing the terms of th agreement, informing the client of the desirability an of the client's opportunity to seek independent counsel and the client then gave the attorney informed consent through a signed writing. The court held that such a retainer agreement satisfied Rule 1.8.

Attorney Struckman must obtain a signed writing from her clients after disclosing the nature of the contract as it is modified and give her clients opportunity to seek independent counsel. If Attorney Struckman does obtain such a signed writing, the retainer agreement will be ethically compliant with Rule 1.8.

II. ATTORNEY STRUCKMAN MUST ENSURE THAT THE ARBITRATION WILL BE NEUTRAL IN ORDER TO BE LEGALLY ENFORCEABLE.

In Johnson v. LM Corporation, the court looked at the enforceability of an arbitration provision with regard to the neutrality of the arbitrators. The court held that the arbitrators must disclose any conflicts of interest, must render a written decision upon considering all available remedies to the parties. Because the employees are particularly vulnerable to the influence of their employer, safeguards such as neutrality must be in place.

Struckman must ensure that, in the event of arbitration, her clients need not worry about any influence she might personally have over the outcome of the arbitration because the arbitrators will be neutral. The arbitrators will be required to hear the merits of the dispute and will consider all remedies available to each party in rendering the decision. If such safeguards are in place, attorney Struckman's retainer agreements will satisfy the standard in *Johnson* and will render fair process of law. An arbitration firm such as the FAA would be a great option for Struckman to consider for future arbitrations.

MPT 1 - Sample Answer # 2

MEMORANDUM

To: Steve Ramirez
From: Examinee
Date: July 29, 2014
Re: Kay Struckman Consultation

You have asked me to assess Ms. Struckman's modification of her current retainer agreements to require the arbitration of any fee dispute. Specifically, this memorandum will assess (1) the ethics of modifying retainer agreements with existing clients and (2) the legal enforceability of Ms. Struckman's proposed provision.

1. Ethics of Modifying Retainer Agreements with Existing Clients

Under *Rice v. Gravier Co.* (Fr. Sup. Ct. 1992), modifying a retainer agreement with an existing client constitutes a business transaction and thus must comply with Franklin Rule of Professional Conduct 1.8. Rule 1.8 states a lawyer may not enter into a business transaction with a client unless (1) the transaction and its terms are fair and reasonable to the client; (2) the transaction and its terms are fully disclosed and transmitted in writing in a manner that the client can reasonably understand; (3) the client is advised in writing of the desirability of seeking independent legal counsel; (4) the client is given a reasonable opportunity to seek independent legal counsel; (5) the client gives informed consent in a signed writing to the essential terms of the transaction and the lawyer's role in the transaction. While a client is only required to have independent legal counsel for prospective agreements limiting malpractice, independent legal counsel would ensure Ms. Struckman's clients were fully informed and well protected in the transaction.

The State of Columbia has also adopted Rule 1.8, and the Columbia State Bar Ethic Committee has issued Ethics Opinion 2011-91 on whether a lawyer may modify a retainer agreement with existing clients to include a provision requiring binding arbitration of malpractice claims. While this Ethics Opinion is not binding in Franklin, it may provide insight into how the Franklin State Bar Ethics Opinion Committee would view Ms. Struckman's similar, but distinctively different issue. Columbia found modification of such agreements failed to comply with Rule 1.8 for three reasons: (1) lawyers could not adequately informed client's of the essential terms of the agreement concerning the intricacies of arbitration; (2) lawyers could not satisfy their fiduciary duties of reasonableness and good faith in those circumstances; and (3) such provisions may avoid investigation into misconduct. The Ethics Opinion noted, however, that binding arbitration clauses for malpractice claims may be appropriate if the claim has arisen and the client is represented by independent counsel. Furthermore, the Ethics Opinion carefully limited its ruling to provisions requiring arbitration of malpractice claims.

Malpractice claims are distinguishable from fee disputes. Malpractice claims tend to be far more complex issues, requiring broader discovery, and involve the assertion that the lawyer

was wrong. The Columbia Ethics Committee noted a client is unlikely to seek independent counsel over a malpractice claim while still represented. Presumably, a fee dispute would arise after the conclusion of the representation, making a client far more likely to retain independent counsel. Independent counsel would assist in alleviating the concerns expressed by the Columbia Ethics Committee by fully informing the client of the procedural and tactical intricacies of arbitration, ensuring the deal was fair and reasonable, and providing an outside parties (independent counsel and the arbitrator) to expose ethical violations. The Columbia Ethics Committee noted other jurisdictions require the attorney to inform the client of certain legal right, including the right to trial, and the implications of forfeiting the right to jury trial. Ms. Struckman would be well advised to include discussions of these rights when informing her client.

An Olympia court recently held a retainer agreement provision requiring arbitration for any disputes resulting from a lawyer's representation of a client was enforceable in *Sloane v. Davis*. Though this opinion is not authoritative, Olympia has also adopted Rule 1.8. Importantly, the attorney in that case was able to comply with Rule 1.8's mandate to full inform the client by sending him a brochure on arbitration that carefully explained its intricacies and implications. The client would then sign and return the agreement after a few days. If Ms. Struckman used a similar brochure that specifically discussed the right to jury trial and the implications of forfeiting that right, she would almost certainly satisfy Rule 1.8.

Importantly, the comments to Franklin's Rule 1.8 take an opposite view of the issue than Columbia, allowing binding arbitration provisions for malpractice claims if the client is independently represented. Such a view may be explained by the Franklin's preference of arbitration for policy reasons, as discussed in *Lawrence v. Walker,* (Fr. Ct. App. 2006). If Franklin found provisions regarding malpractice claims could overcome concerns similar to those expressed by the Columbia Ethics Committee through requiring independent counsel, provisions regarding fee disputes could also be ethical in the presence of independent counsel.

Given the different nature of fee disputes and Franklin's differing approach to the arbitration of malpractice claims, compliance with the conditions in Rule 1.8 and requiring the client retain independent counsel would satisfy Rule 1.8 and thus allow Ms. Struckman to ethically modify her retainer agreements with existing clients. In an abundance of caution, however, Ms, Struckman would be well served to first seek an advisory opinion from the Franklin Ethics Committee on the issue.

<u>2. Legal Enforceability of Ms. Struckman's Proposed Provision Requiring Arbitration</u>

Lawrence v. Walker, (Fr. Ct. App. 2006), outlines the requirements for a legally enforceable retainer agreement requiring binding arbitration for malpractice claims. These requirements would likely also apply to retainer agreement provisions requiring binding arbitration of fee disputes. A binding arbitration provision will only be enforced if (1) the provision was entered into openly and fairly; (2) the client has been explicitly made aware of the existence of the arbitration provision and its implications; and (3) the client receives full disclosure of the provisions consequences. Furthermore, the lawyer must prove the good faith of the

agreement. Ms. Struckman will comply with the first and third of these requirements simply by complying with the requirements of Rule 1.8.

In *Lawrence*, the court noted that arbitration provision was not enforceable because (1) it did not specifically mention the arbitration of malpractice claims and (2) was not a product of negotiation. Ms. Struckman's proposed provision does not specifically mention fee disputes. Absent revision of the provision to specifically mention fee disputes, the provision would not be legally enforceable as written. Should she wish any other type of dispute to be covered by the arbitration provision, she must also specifically list them. Ms. Struckman's provision would be a product of negotiation if offers to forego fee increases as consideration. This would constitute a "bargained for" exchange. The bargaining and negotiation process would be further bolstered IF the client was represented by independent counsel.

The court noted that the minimum conditions for an enforceable arbitration agreement between employer and employee, articulated in *Johnson v. LM Corp.* (Franklin Ct. Ap.. 2004), would also be required between attorney and client. These requirements include (1) a neutral arbitrator, (2) more than minimal discovery, (3) a written, reasoned decision, (4) all types of relief that would otherwise be available in court, and (5) employees can not be required to pay unreasonable fees or costs. The Court in *Johnson* found a neutral arbitrator is one who must disclose any grounds that may exist for a conflict between the arbitrator's interests and the parties' interests. An arbitrator selected from the Franklin Arbitration Association is sufficient. Furthermore, "more than minimal discovery" simply requires any discovery there is a demonstrated need for, not a specific number of depositions.

MPT 1 - Sample Answer # 3

MEMORANDUM

To: Steve Ramirez
From: Examinee
Date: July 29, 20
Re: Kay Struckman Consultation

I. Requirements for Modification of Retainer Agreements under the Franklin Rules of Professional Conduct

Ms. Struckman may modify her retainer agreements with existing clients to require arbitration of fee disputes, provided she makes changes to the proposed language and follows the process required by the Rules of Professional Conduct. Under Rule 1.8, modifying a retainer agreement amounts to a business transaction and must meet the requirements of that rule. *See* Comment (I). First, the transaction must be fair and reasonable to the client. Second, the terms must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client. Third, the client must be advised to seek independent counsel and given the opportunity to do so. Fourth, the client must give informed consent, in writing, to the essential terms of the transaction. The rules also provide that a lawyer may not prospectively limit her liability for malpractice, unless the client is independently represented in making the agreement.

The lawyer bears the burden of establishing elements required by Rule 1.8. Columbia Ethics Opinion 2011-91 ("Ethics Opinion"). Because lawyers owe a strict fiduciary duty to their clients, the court will scrutinize carefully agreements entered into with clients.

Following Rule 1.8, as interpreted by the Franklin Court of Appeals and authorities in other jurisdictions that follow the same rule, Ms. Struckman's modification of her retainer agreements should meet the following conditions.

A. Eliminate language requiring arbitration for future malpractice claims

The Columbia State Bar Ethics Committee has expressed deep concern about retainer agreements requiring arbitration for *future* malpractice claims. Full disclosure and fairness to the client are at risk, because the client agrees to arbitration without knowing the particular factual circumstances of the dispute. The client cannot properly weigh the risks and benefits of arbitration in advance. Further the Columbia Ethics Committee opined that it is unrealistic for clients to seek and pay for independent counsel during a representation by another attorney. It is therefore likely that the client will not have adequate advice before entering into a modification of an existing agreement.

The Supreme Court of Olympia has approved of retainer agreements requiring arbitration of malpractice claims when certain conditions are met. *See* Sloan v. Davis. The opinion addresses many of the same concerns the Columbia Ethics Opinion raises: fairness and

reasonableness, full disclosure, advice from independent counsel, and the inefficacy of arbitration procedures. On the facts in that case, the Court found the arbitration agreement satisfied the requirements of Rule 1.8.

Here, Ms. Struckman's proposed modification includes language that may encompass future malpractice claims. The clause states that "[a]ny claim or controversy arising out of, or relating to, Lawyer's representation of Client shall be settled by arbitration." Because the Columbia Ethics Opinion strongly disapproves of arbitration agreements as to *future* malpractice claims, Ms. Struckman should limit the language to apply only to future fee disputes. If Franklin follows the path of the Supreme Court of Olympia, arbitration for future of malpractice claims may be approved. However, because Ms. Struckman is mostly interested in arbitration for fee disputes, she should exclude malpractice claims in case Franklin follows the path of the Columbia State Bar Ethics Committee.

B. Provide full and fair disclosure to clients

Both the Columbia Ethics Opinion and the Supreme Court of Olympia emphasize the importance of complete disclosure of the terms and consequences of arbitration. Disclosure must be made in a manner that is understandable to the clients. For example, in *Sloane v. Davis*, the Supreme Court of Olympia cited approvingly oral discussions in additions to a brochure, mailed to the client, fully describing the nature and consequences of arbitration. Of particular importance is the client's right to a jury trial, and the waiver of that right under the arbitration agreement.

Here, Ms. Struckman should engage in thorough discussions with her clients and send them written materials explaining the nature and consequences of arbitration. Fortunately, many of Ms. Struckman's clients appear to be familiar with arbitration already. They have requested similar clauses in their contracts with their own customers and clients. Further, fee disputes are not complicated. Nonetheless, because Ms. Struckman's include a class of clients the Columbia Ethics Opinion singled out as vulnerable, she should be sure to fully discuss and make available explanatory materials concerning arbitration of fee disputes. She should be sure to discuss the waiver of a right to jury trial.

C. Advise clients to seek independent counsel

Rule 1.8 clearly requires the lawyer to advice clients to seek the advice of independent counsel. The Columbia Ethics Opinion and the Supreme Court of Olympia emphasized the importance of this step. Here, before signing a modification of her retainer agreements, Ms. Struckman should ensure that her clients have an opportunity to consult with independent counsel. The Supreme Court of Olympia found that one week to do so before requiring written consent was enough.

D. Require written consent

Finally, Rule 1.8 mandates that clients give informed consent to the modification of retainer agreements in writing. The informed consent must specifically state the essential terms of

the agreement. Here, if Ms. Struckman follows this procedural step, in addition to the conditions discussed above, her modification to require arbitration of future fee agreements will not violate the Franklin Rules of Professional Conduct.

II. Requirements for Legal Enforceability

The Franklin Court of Appeals has addressed the legal enforceability agreements to binding arbitration between attorneys and clients. To be enforceable, the agreement must meet procedural and substantive requirements. Procedurally, the agreement must be entered into openly and fairly. Lawrence v. Walker. Substantively, the agreement likely must meet the requirements imposed on arbitration agreements between employees and employers-a relationship involving a similar imbalance of bargaining power. *See* Johnson v. LM Corporation.

A. Full and fair disclosure

The steps required for full and fair disclosure largely mirror the requirements of Rule 1.8, discussed above. The lawyer must make the client explicitly aware of the arbitration provision and its implications, such that the client is excercising a "real choice." *Lawrence v. Walker*. The agreement should be the product of negotiation. *Id.* Here, in addition to the conditions discussed concerning Rule 1.8 above, Ms. Struckman should ensure the modification is a negotiated agreement. Because she is offering to eliminate fee increases for two years, and fee disputes are not unreasonably complicated, the court will likely find this requirement is satisfied.

B. Provide for a neutral arbitrator

To comply with basic due process, the agreement must ensure a neutral arbitrator will arbitrate the future dispute. The arbitrator should fully disclose any conflicts before hearing the case, such that the parties can evaluate his or her neutrality. The Supreme Court of Franklin has cited the Franklin Arbitration Association (FAA) as a well-respected group that meets these requirements. Here, Mrs. Struckman should include language requiring any disputes to be brought before an arbitrator of the FAA.

C. Provide for more than minimal discovery

The arbitration procedures required must include a fair opportunity for the parties to be heard. The procedures used by the Franklin Arbitration Association were apparently sufficient. *Johnson v. LM Corp.* Although they limit the number of depositions each party may take, the court found the procedures were adequate. Selecting the FAA should meet this condition here.

D. Require a written, reasoned decision

Ms. Struckman should include language requiring the arbitrator to issue a written, reasoned decision. This procedure is required by due process to allow the parties to ensure the law

was properly applied and the full range of available remedies was considered. Under Franklin Law, arbitrators are required to apply the law to the disputes they resolve.

E. Provide for all types of relief

Ms. Struckman's proposed agreement likely satisfies this requirement. She does not attempt to limit the remedies available through arbitration. She should ensure that the arbitrator selected in the agreement, such as the FAA, does not limit the remedies available.

F. Not require clients to pay unreasonable fees

Finally, Ms. Struckman should include a requirement that arbitration fees and costs are split and not unduly burdensome, such that the client's ability to represent her interests are frustrated.

MPT 2 - Sample Answer # 1

To: Henry Fines
From: Applicant
Letter to Steven Glenn re: Linda Duram FMLA

Mr. Steven Glenn
Vice President of Human Resources
Signs Inc.

I represent Ms. Linda Duram, a graphic artist employed by Signs Inc (Signs). Ms. Duram has been wrongfully denied leave under the Family and Medical Leave Act (FMLA), placed on probation, and threatened with termination.

On July 7, 2014, Ms. Duram requested leave to care for her grandmother, whose sister had died just the day before, while she traveled to the funeral on July 9. Ms. Duram's grandmother had cared for her since she was six years old and was now herself suffering from end-stage congestive heartfailure with only a few months left to live. Ms. Duram was necessary to give care to her grandmother during this trip because her grandmother could not walk, bathe, take medications, feed herself, or dress herself without assistance. Ms. Duram should have been granted her requested leave under FMLA, but instead she was wrongfully denied.

FMLA provides that an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period in order to care for a parent with a serious health condition. FMLA requires that the plaintiff was eligible, the employer was covered, that the plaintiff was entitled to take leave, that the plaintiff provided sufficient notice of intent to leave, and that the employer denied the benefits. It is undisputed that Linda is a covered employee and that Signs is a covered employer. Additionally, by Mr. Glenn's own admission in email correspondence, Ms. Duram was denied leave, placed on probation, and threatened with termination for future infractions. Therefore, in dispute is only whether the act applies to her care of her grandmother during the trip to the funeral and whether Ms. Duram gave notice as required. A grandmother can qualify under the act if she stands *in loco parentis.* And care for the grandmother, while the grandmother travels and attends a funeral, also qualifies.

<u>FMLA applies to Ms. Duram's grandmother because she meets the definition of "parent" who she stood *in loco parentis*.</u>

While FMLA does not normally authorize care of grandparents, it allows for a grandparent who stands *in loco parentis*. The term *in loco parentis* is not defined by FMLA but by state law. The U.S. Court of Appeals held in *Carson* that the State of Franklin defines the term to refer to a person who intends to and does put herself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of legal process. The court may consider the child's age, the child's degree of dependence, or the amount of support by the person claiming to be *in loco parentis*.

Ms. Duram has been raised by her grandparents on and off since she was six years old for months at a time because her parents had drug abuse problems. At the age of 12, her parents were sent to prison, and Ms. Duram lived with her grandparents for 18 months. When her parents were released from prison, Ms. Duram stayed with them for only 6 months before being returned to her grandparents for three months. After that, she did not return to her parents, but rather they all lived with her grandparents until Ms. Duram was in high school. Then, when Ms. Durham was a junior in high school, her parents again went to prison for three years. Although her grandparents never officially adopted her, they took care of her, fed her, clothed her, took her to school, and took her to the doctor, even during the periods when the parents were living with the grandparents. The grandparents paid for summer baseball and soccer camps and loaned her money to get a car to go to school. These go well beyond the acts that any grandparent would do, and are in stark contrast to the situation in *Carson*, where the grandfather housed his grandchild on some weekends and vacations, gave financial support during college, and attended graduation. This situation is much more like that of *Phillips*, where the court held that a grandmother with whom the child lived since he was four, who enrolled him in school, took him to the doctor, provided day to day support, and attended parent-teacher conferences qualified as a *in loco parentis*. Just like *Phillips*, Ms. Duram's grandmother has acted *in loco parentis* and qualifies as a parent under FMLA.

Ms. Duram's leave qualifies because it was to be in close and continuing proximity and to provide medical treatments to her grandmother for the purpose of her grandmother's (not her own) traveling and attending a funeral.

The U.S. Court of Appeals has required that the types of care that qualify under FMLA be (1) the employee is in close and continuing proximity to the person being cared for, and (2) to offer some actual care to the person with a serious health condition. Close and continuing proximity will not include being at home or on a 4 day trip to retrieve a car while the person cared for is in the hospital. Actual care must be more than merely accompanying a person on a trip. It must be related to actual treatment and will not apply to the funeral of the person.

Ms. Duram's leave related to the actual day-to-day medical treatment of her grandmother while her grandmother traveled. Unlike the cases where the employee traveled without the person they were supposedly caring for, here Ms. Duram did not seek leave for her own travel. Her travel was only incident to her grandmother's travel to the funeral. Ms. Duram was to be with her grandmother at all times because her grandmother cannot walk, bath, take her medications, feed herself, or dress herself. The grandmother's doctor's affidavit explained that because the grandmother was suffering from congestive heart failure which will lead to her death in months, she needed to be in a wheelchair with oxygen and accompanied by someone familiar with her condition and personal needs. This same affidavit explained that Ms. Duram had cared for her grandmother for the past two months and therefore was the best person to help her grandmother in and out of the wheelchair, administer oxygen, operate the heart pump, administer the medications, and provide personal care needed. This both the time of close and continuing proximity and actual treatment that contrast the time of behavior denied leave by the U.S. Court of Appeals in

Shaw. In *Shaw*, the employee was at home while his daughter was in the hospital and then sought to attend her funeral after she died. Unlike *Shaw*, Ms. Duram was always by her grandmother's side. Moreover, she did not attend her grandmother's funeral but rather her grandmother's sister's funeral. Thus, the funeral distinction is irrelevant in this case.

<u>30 days notice is not required for unforeseeable leave, and therefore Ms. Duram's notice as soon as practicable was appropriate.</u>

FMLA generally requires notice of a foreseeable birth or placement of not less than 30 days, unless the date or placement requires leave to being in less than 30 days, in which case the employee need only provide notice as soon as practicable. Furthermore, § 825.303 clarifies that if the timing of the need for leave was not foreseeable, then the employee need only provide notice as soon as practicable.

This was not an expected birth or placement. Here, the grandmother's sister died. There are no facts here that suggest that Ms. Duram knew or should have known about the date that her grandmother's sister would die such that any funeral could be considered foreseeable. Although Ms. Duram's grandmother is in steadily declining health, there is no information suggesting the same of the sister. Even if the death of the sister had been generally foreseeable within some window, the date of the funeral would not be capable of being known until after she actually died. While it might be foreseeable that the grandmother would need help any time she needed to travel, there are no facts that suggest any foreseeble knowledge of a need to travel. Here, the sister died on July 6, and the funeral was on July 9. Thus, all Ms. Duram owed was notice as soon as practicable because even if the death was foreseeable, the funeral was scheduled within 3 days (well less than the 30 days specified in FMLA) and was completely out of the control of Ms. Duram. As mentioned however, this death and date of funeral was unforseeable, and so Ms. Duram owed notice as soon as practicable for that reason as well. She notified Signs at 9:15 am, the very next morning after her grandmother's sister's death.

The purpose of the FMLA is entitle employees to take reasonable leave to care for the serious health conditions of family members, so that there will be a better balance of the demands of the workplace with the needs of families. Ms. Duram has suffered an unforseeable family tragedy that required her to provide medical treatments to her grandmother, and wrongfully denied leave. Considering all of the above, we demand that Signs reverse its decision denying FMLA leave to Linda Duram and retract its threat of termination.

Henry Fines
Burton and Fines LLC

MPT 2 - Sample Answer # 2

July 29, 2014

Mr. Steve Glenn
Vice President of Human Resources
Signs, Inc.

Re: Linda Duram FMLA Request & Denial

Dear Steve:

I am an attorney at Burton and Fines LLC, and I represent Linda Duram, one of your employees. You recently placed Ms. Duram on probation, and I am writing you today to request that Signs, Inc. reverse that decision because it incorrectly denied Ms. Duram leave under the Family and Medical Leave Act.

Ms. Duram requested five days leave on July 7, 2014 in order to care for her terminally ill grandmother, Emma Baston, who wished to attend her sister's funeral. Without Ms. Duram her grandmother would not have been able to make the trip. Ms. Duram requested leave the day after learning of her relative's death, and Signs denied the request, arguing that the FMLA did not apply to her situation. On July 16 you placed Ms. Duram on probation for missing five days of work, three of which were unpaid after the exhaustion of her two days of accrued vacation time.

On behalf of Ms. Duram, we request that you reconsider this decision. It is our strong contention that the FMLA does apply to Ms. Duram's situation because of her specific relationship with her grandmother and the grandmother's illness. During the five days, Ms. Duram missed work she cared for her grandmother who has a serious medical condition requiring nearly constant treatment as she has only a few months to live. These facts place Ms. Duram under the protection of the FMLA and entitle to her to protected leave. More specifically, the case law and federal regulations support our contention that the FMLA applies to Ms. Duram in this situation.

1. <u>The Act applies to grandparents who assume the obligations of a parent, which Ms. Baston did.</u>

§2611 of the FMLA defines the term parent as including "an individual who stood i*n loco parentis* to an employee when the employee was a son or daughter." The FMLA does not define "*in loco parentis*" but *Carson v. Houser Manufacturing, Inc.* states that it is defined by state law and the courts in Franklin have defined it to refer "to a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without" formal adoption. As Ms. Duram's affidavit demonstrates, when Ms. Duram was a child Ms. Baston intended and did put herself in that position along with her late husband. *Carson* says a court may consider a child's age, degree of dependence, and the amount of support provided to the child. Ms. Baston provided Ms.

Duram with a place to live, schooling, food, clothing, gifts, medical care, and monetary support from the time Ms. Duram was six years old until she graduated college. Under the *Carson* factors, Ms. Baston would be *in loco parentis* because of Ms. Duram's young age, being completely dependent, and the extensive amount of support Ms. Baston provided to her.

Ms. Duram's situation can be distinguished from the facts in *Carson* where the grandson never lived with the grandfather and only received some financial support when in college. The grandson was older, less dependent, and received much less support over a shorter period of time than Ms. Duram. The present situation is more similar to *Phillips v. Franklin City Park District* where the grandmother met the *in loco parentis* standard when she grandson lived with her from the age of four, she enrolled him in school and provided him medical care and financial support.

2. <u>The Act applies to patients who need continuing treatment, as Ms. Baston does, regardless of the location of treatment.</u>

§2611 of the FMLA defines serious health condition as one that involves "continuing treatment by a health care provider." As you can see from the affidavit of Dr. Maria Oliver, Ms. Baston has a serious health condition. Ms. Baston has congestive heart failure which is terminal. She receives daily treatment from either family or nurses to assist with daily functioning. She uses a wheelchair and oxygen, and is prescribed medication and therapy. She also needs to have her heart pumped for fluids regularly. Not only does she require daily assistance but her doctor checks up on her condition weekly.

The Code of Federal Regulations places Ms. Baston clearly in the category of someone with a "serious health condition." She receives "continuing treatment" and treatment includes prescription medications and therapy and the regulations specifically list oxygen as an example. The CFR provision on continuing treatment explicitly includes chronic conditions which continue over an extended period of time (here for months), requires periodic visits (Ms. Baston requires daily care), and may cause periods of incapacity (Ms. Baston is incapable of conducting daily tasks).

Even though the statute mentions that a "serious health condition" involves care in a hospital, hospice, or residential medical care facility that requirement is an alternative to a condition that involves continuing treatment, which neither the regulations nor the statute states must be done in the home.

3. <u>The Act does not apply to funerals, but does apply to caring for Ms. Baston who is still alive.</u>

It is correct that the FMLA does not apply to attending a funeral when the funeral is for the person that they employee seeks " to care for." That was the situation in *Shaw v. BG Enterprises*, where the person the employed claimed he was caring for, his daughter, was the one whose funeral he attended. There the court upheld the denial of leave. This situation is distinct because Ms. Duram left work "to care for" her grandmother, not by

attending the grandmother's funeral but by performing tasks such as getting Ms. Baston into and out of her wheelchair, administering oxygen, operating her heart pump, administering medications, and providing other medical care. There is no doubt that the care provided by Ms. Duram meets the standards in *Shaw* of being in close and continuing proximity to the person being cared for and to offer actual care to the person with a serious medical condition. Ms. Duram was physically present with her grandmother during her five day absence and did actually provide medical care to treat Ms. Baston's congestive heart failure. These facts distinguish Ms. Duram's situation from *Tellis v. Alaska Airlines* and *Roberts v. Ten Pen Bowl* because there was "some actual care" provided both by Ms. Duram and at direction of the doctor.

4. <u>The Act only requires notices as soon as practicable when there is a change in circumstances, which Ms. Duram provided.</u>

The FMLA only requires 30 days notice in instances of "foreseeable leave" such as an expected birth or adoption. Ms. Duram did not have any foreseeability here, as she did not know that her grandmother's sister was going to pass away. The CFR in §825.302 §825.303 allows for the employee to give notice "as soon as practicable" when giving 30 days notice is not practicable for reasons such as a change in circumstances. Ms. Baston's need to travel represented a change in circumstances that could not be predicted ahead of time. Ms. Duram provided notice the very next morning after learning about the death of Ms. Baston's sister, which suffices for the requirements of the FMLA. Her notice further provided all necessary information to determine that the FMLA did apply, including that her family members is under the continuing care of a health care provider, specifically the prescribing of medication and therapy.

In light of these facts, I request that you reverse the decision to deny Ms. Dura FMLA leave, take her off of probation, and retract the threat of termination.

Respectfully,

____

Henry Fines

MPT 2 - Sample Answer # 3

To: Steven Glenn
From: Henry Fines, Burton & Fines LLC
Date: July 29, 2014
Re: Linda Duram's FMLA Matter

Dear Mr. Glenn,

I have been retained by your employee Linda Duram to represent her in the matter of her request and your denial of her leave under the Family and Medical Leave Act ("FMLA"). The purpose of this letter is to ask you to reconsider and reverse your company's decision denying Ms. Duram's FMLA as well as to retract the threat of termination. According to the FMLA, your denial of her request for leave constitutes interference with her statutory right to take leave.

As you are aware, Ms. Duram's grandmother's sister died suddenly on Sunday, July 6. Ms. Duram gave notice immediately on the first business day early in the morning at 9:15am notifying you of both the death, her grandmother's medical condition, and that the condition required Ms. Duram's care. Signs Inc, however, denied Ms. Duram's request and threatened her with termination. This denial and threat of termination constitutes interference with Ms. Duram's right to take leave under the FMLA. Undisputed is Ms. Duram’s eligibility for FMLA protection, Signs Inc being covered by the FMLA, and Signs Inc's denial of her leave. What is in dispute, according to your letter, is (1) the Act providing for the care of grandparents, (2) whether the FMLA applies to care provided in travel, (3) particularly travel to a funeral, and (4) failure to give requisite notice. I will address each of these points and demonstrate to you that you are misinformed as to the requirements of the law and are in fact interfering with Ms. Duram's statutory rights under the FMLA.

1. According to the FMLA, "parent" can mean an individual who stood *in loco parentis* to an employee. 29 USC § 2612(7). This has been interpreted by the 15th Circuit in Carson v. Houser Mfg to "a person who intends to and does put himself in a situation of a lawful parent by assuming the obligations incident to the parental relation." The court, citing Phillips, stated that a grandparent who provided for his grandson, took him to school, medical appointments, provided for day-to-day financial support, etc, was sufficient to meet the *in loco parentis* standard for the FMLA. Here, Ms. Duram's grandmother provided similar care for Ms. Duram during her childhood and upbringing thereby making her eligible to be a "parent" under the *in loco parentis* provision of the statute. According to Ms. Duram's affidavit, for most of her childhood she lived with her grandparents on and off, but even when she did not live with them they continued to provide the same care a parent would. For instance they fed and clothed her, took her to school and the doctor, helped with homework, took to camps, etc. All of the same factors the court in Phillips stated were sufficient to make a grandparent *in loco parentis*. Therefore, by this standard, while Ms. Duram was caring for her grandparent, for the purposes of the statute her relationship was such that she was caring for a "parent." This addresses your first objection.

2. The FMLA requires an employer to allow an employee leave to care for a parent's serious health condition, which includes continuing treatment by a health care provider. 29 USC § 2612 (a)(1)(c). Some of these terms are technical and have additional meanings not obvious to the lay reader which are set out in the Code of Federal Regulations (CFR). For instance, "Continuing treatment by a health care provider" includes (c) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. These include treatment requiring any of the following: (1) periodic visits (at least twice a year) for treatment under direct supervisor of a health care provider and (2) continuing over an extended period of time. CFR § 825.115. According Dr. Maria A. Oliver, MD, Ms. Duram's grandmother's physician, has written about Ms. Duram's grandmother, Ms. Emma Baston, health condition. As described, Ms. Baston, falls under the definition of "serious health condition" which encompasses "continuing treatment by a health care provider," in that Dr. Oliver has prescribed a set daily medical regime to provider her care under Dr. Oliver's direct supervision. For instance, Ms. Baston uses a wheelchair and oxygen, needs fluids to be pumped out of her heart routinely, requires medication and therapies, etc. Dr. Oliver oversees the provision of this care weekly. She also required that in order for Ms. Baston to travel that someone familiar with her condition travel with her, and Ms. Duram meets and exceeds those requirements in that she also has power of attorney over her health care decisions and attends to her needs and oversees all other care she receives. As Ms. Baston definitely meets the requirement of a person receiving continuing treatment by a health care provider (both on this trip and on a routine basis as she takes care of her weekly).

Additionally, CFR § 825.113(c) states a treatment for "continuing treatment" expressly includes a regimen of taking prescription medications and/or therapy requiring special equipment to resolve or alleviate a health condition (e.g. oxygen). Ms. Duram does ALL of these. She provides Ms. Baston's necessary therapy for relieving the fluid build up in her heart as well as supervises her use of an oxygen tank--a specific example given in the CFR for treatment.

Furthermore, the "care for" requirement of the statute and CFR as described by the 15th Circuit Court in Shaw v BG Enterprises requires two things (a) that Ms. Duram be in close and continuing proximity to her grandmothers, and (b) offer some actual care to the person with a serious health condition. Ms. Duram meets both of these requirements. Requirement (b) has already been described above in that Ms. Duram provided all the health care that her grandmother required. As for requirement (a), Ms. Duram meets this requirement as well in that she was with her grandmother providing care for the ENTIRE trip to attend Ms. Baston's sister's funeral. This addresses your second objection.

3. While you dispute whether the Act applies to funerals, Ms. Duram while entitled to take leave to provide for her grandmother for the full 12 week period she's entitled to annually under the FMLA, decided to only take 5 days to care for her grandmother. 29 USC § 2612(a)(1). As described above in response to your second objection, as long as she's providing the care and is in continuous proximity to her grandmother it does not matter *where* the care is being provided, as long as it is being provided. This addresses your third reason.

4. As for the leave requirement, while the statute does typically require 30 days notice, it ONLY requires that notice if the FMLA leave is "foreseeable." CFR § 825.302. Otherwise, if the leave is not foreseeable, an employee must provide notice "as soon as practicable under the facts and circumstances of the case." CFR § 825.303. The notice must provide sufficient information for the employer to make a decision, including whether the employee's family member is under the continuing care of a health care provider. CFR § 825.303. Ms. Duram's grandmother's sister's death certainly qualifies as an "unforeseen" event, thereby excusing the 30 days notice requirement. The sister died on July 6, and she told you on the first following business day, July 7, at 9:15 am. She not only told you the unforeseen event, but also indicated why she must go with her grandmother, describing her continuing health care needs which only she could provide (including her medications and therapies). This addresses your fourth objection.

By addressing these three issues you've raised, I've demonstrated that Ms. Duram was entitled to take leave under the Act and provided sufficient notice. Ms. Duram is eligible for FMLA protection, Signs Inc is covered by the FMLA, Ms. Duram was entitled to take leave and provided sufficient notice of intent to leave, and you denied her leave. Your denial of her leave request constitutes interference with Ms. Duram's rights under the FMLA.

To settle this matter, we request (1) you REVERSE your company's decision to deny Ms. Duram's FMLA request, and (2) RETRACT the threat of termination.

Sincerely,

Henry Fines
Burton & Fines LLC